M.P.C. Plating, Inc. *and* Local Union No. 507, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Cases 8–CA–18513(E), 8–CA–18514(E), and 8–CA–18515(E)

February 19, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On March 28, 1990, Administrative Law Judge Arline Pacht issued the attached Supplemental Order. The Applicant filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Applicant filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Supplemental Order and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of the Applicant, M.P.C. Plating, Inc., Cleveland, Ohio, for an award under the Equal Access to Justice Act is denied.

[1] The Applicant has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We note that the judge inadvertently stated that the amended complaint was reissued in 1988 rather than 1987. Additionally, the Board's decision in *Tube Craft*, 287 NLRB 491, was issued December 16, 1987.

Susan E. Fernandez, Esq., for the General Counsel.
Donald F. Woodcock, Esq. and *William L. S. Ross, Esq. (Calfee, Halter & Griswold)*, of Cleveland, Ohio, for the Respondent.

SUPPLEMENTAL ORDER

Equal Access to Justice Act

Procedural Statement of Current Proceedings

ARLINE PACHT, Administrative Law Judge. On June 15, 1989, the National Labor Relations Board issued a Decision and Order in the case.[1] Thereafter, on July 14, 1989, Respondent filed an application for award of fees and other expenses pursuant to the Equal Access to Justice Act (EAJA), Pub. L. 96–481, 94 Stat. 2325 and Section 102.143 et seq. of the Board's Rules and Regulations (Rules). On July 17, the matter was referred to me for appropriate action. On September 14, counsel for the General Counsel (General Counsel) filed a motion to dismiss which the Respondent answered on November 3.

On January 8, 1990, based on the pleadings before me, I issued an interim order indicating that the Respondent's application would be granted in part and denied in part, with detailed findings of fact and conclusions of law to follow in a final Supplemental Order. Specifically, I stated that the Respondent had prevailed in a portion of the proceeding pertaining to the allegations set forth in paragraph 17 of the amended consolidated complaint, and that the General Counsel failed to show that the Government's position either was substantially justified or that special circumstances obtained. At the same time, I found substantial justification for the General Counsel's position in litigating the allegations in paragraphs 20 and 21 of the complaint, which, together with special circumstances, cause the award of attorney fees for services performed in connection with that portion of the case to be unwarranted. Pursuant to this ruling, I directed the Applicant to submit an amended application, itemizing fees and expenses related solely to defending against the issue framed in paragraphs 17 to 19. The General Counsel was granted leave to submit a response thereto.

In accordance with the Supplemental Interim Order, the Applicant submitted a revised bill on January 19, 1990. Thereafter, on February 6, the General Counsel filed a motion for reconsideration of the supplemental interim order and memorandum in opposition to Respondent's itemized fee statement. Respondent answered on February 16 with a memorandum in support of its amended itemized fee statement and in opposition to General Counsel's motion for reconsideration.

After fully considering the foregoing pleadings, particularly, the parties' latest submissions, and having once again reviewed relevant portions of the trial record, I find the General Counsel's motion for reconsideration persuasive. Therefore, contrary to my initial interim ruling, I have concluded, for the reasons set forth below, that the Government has demonstrated that its positions in the above-captioned case were substantially justified.[2]

Background: The Unfair Labor Practice Case

A brief summary of the material facts in the underlying unfair labor proceeding is in order. Respondent employed a work force of approximately 30 employees in its metal plating business. Half of this number were permanent employees on the M.P.C. payroll; the balance was obtained through Ger-Mar Temps, an employment agency which specialized in referrals of temporary industrial workers. On July 23, 1985, just after learning of the employees' union activities and after a majority of employees had signed authorization cards, the Respondent insisted that in order to continue working, the members of its permanent work force would have to transfer to the temporary employment agency with a concomitant loss of benefits. When all but several employees refused to transfer, they were denied entry to the plant. A strike ensued which was marred by picket line misconduct. Between August 5 and 8, the Respondent fired 11 of the strikers.

[1] 295 NLRB 583.

[2] I regret any inconvenience the Interim Order may have caused the parties. However, I am firmly convinced that it is far better to correct rather than perpetuate an error in judgment.

As alleged in paragraph 16 of the third amended consolidated complaint, I concluded that Respondent constructively discharged almost all its permanent employees by insisting that they transfer to the Ger-Mar Temps payroll. Paragraphs 17, 18, and 19 of the complaint further alleged that the 15 Ger-Mar employees who were assigned to M.P.C. on or about July 23, 1985, were denied an opportunity for full-time permanent employment. Finding that the evidence was insufficient to prove which if any of the Ger-Mar employees was denied an opportunity for full-time employment with the Respondent, I ruled that the pertinent allegations in the complaint should be dismissed.

Paragraphs 20 and 21 of the complaint further alleged that on or about August 5, 1985, Respondent again discharged l0 of its permanent work crew because of their union activities. The Respondent answered that the discharges were justified by the workers' picket line misconduct. During the course of the hearing, the General Counsel moved to amend the complaint to concede that the l0 strikers had lost their reinstatement rights, but in a few instances, on dates somewhat later than those chosen by the Respondent. In agreement with the Respondent, I concluded that the named employees were discharged for strike misconduct on or shortly after August 5. In the absence of exceptions by the General Counsel and the Charging Party, the rulings regarding the denial of permanent employment and the propriety of the discharges for strike misconduct became final.

The Board affirmed the decision below with several important modifications. Based on findings that the Respondent had committed serious, extensive, and pervasive unfair labor practices, the Board concluded that a bargaining order was warranted.[3] Further, the Board ordered the Respondent to reestablish a permanent work force.

The Respondent contends that within the meaning of the Equal Access to Justice Act, it was the prevailing party with respect to two discrete parts of the case: (1) the allegations in paragraphs 17 to 19 that M.P.C. unlawfully denied certain named Ger-Mar temporary employees an opportunity for full-time employment, and (2) the allegations in paragraphs 20 and 21 that it discharged 10 permanent employees for discriminatory reasons. The General Counsel maintains that the Government's positions were substantially justified. Having reconsidered the pleadings, I find merit in the General Counsel's positions.

Substantial Justification: Applicable Legal Principles

The EAJA entitles a private party who prevails against a Federal agency, in whole or in a significant and discrete substantive portion of the proceeding, to recover its fees and expenses ''unless the position of the General Counsel over which the applicant has prevailed was substantially justified.''[4] In *Pierce v. Underwood*, 108 S.Ct. 2541, 2550 (1988), the Supreme Court defined the test for substantial justification to be whether the agency's position was reasonable in law and fact at the time the action was commenced. In addition, in order to defeat an award, the General Counsel must prove that its position was substantially justified with respect to each readily identifiable stage of the proceeding.[5] However, as Congress stressed when enacting EAJA, in order to meet its burden the Government is not required to prove that prior to trial its decision to litigate was based on a substantial probability of prevailing.[6]

EAJA also provides that fees may be denied where ''special circumstances make an award unjust.''[7] Legislative history contains the following statement regarding the purpose of this provision:

> This ''safety valve'' helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.[8]

The Opportunity for Permanent Employment Issue

Respondent seeks attorney fees with respect to paragraphs 17 to 19 of the complaint which alleged, in substance, that on or about July 23, 1985, Respondent denied named Ger-Mar temporary employees, ''the opportunity for full-time permanent employment . . . because they joined, supported or assisted the Union.''

In its posttrial brief to the administrative law judge, the General Counsel argued that the allegations of ''denial of opportunity'' were closely related to that portion of the case dealing with Respondent's attempt to transfer its permanent work force to Ger-Mar's payroll. The theory was that by disbanding the full-time work force for discriminatory motives, the Respondent thereby denied the Ger-Mar employees any opportunity they may have had to become full-time employees. To establish that permanent employment was a real possibility, the General Counsel adduced evidence that 8 of the 14 full-time personnel originally came from the temporary agency. The record also showed that the Ger-Mar agency, which had supplied industrial workers to M.P.C. since 1984, did not oppose temporaries accepting full-time employment after a certain number of weeks had elapsed during which they recovered expenses.

In deciding this issue, I did not reject the ''denial of opportunity theory'' qua legal theory, for it did not seem unreasonable then or now. Rather, the reasons for my finding that the Respondent had not violated the Act in this instance were twofold. First, I found that adding temporary employees to the payroll was discretionary and depended both on the individual employee's skills and Respondent's needs. Since no evidence had been introduced to show whether any of the Ger-Mar employees were sufficiently skilled, I concluded that there was a lack of evidence to determine whether any of them would have been offered permanent employment. Second, based on unrebutted evidence, I found that Respondent had instituted a hiring freeze in late June, before it

[3] In addition to agreeing that the Respondent had wrongfully discharged its permanent work force, the Board affirmed findings that the Respondent had engaged in unlawful interrogations, directed an employee to engage in surveillance, threatened to close the plant rather than accede to union representation, and fired an employee suspected of harboring union sympathies.

[4] 5 U.S.C. § 504 (1988); Board's Rules and Regulations, Sec. 102.144(a).

[5] See *Lathers Local 46 (Building Contractors)*, 289 NLRB 505 (1988), citing *Tyler Business Services v. NLRB*, 695 F. 2d 73 (4th Cir. 1982).

[6] S. Rep. No. 253, 96th Cong. 1st Sess. 6; H.R. Rep. No. 1418, 96th Cong. 2d Sess. 16 reprinted in 5 U.S. Code Cong. & AD News 4953, 4990 (1980).

[7] Board Rules, Sec. 102.144(b).

[8] 5 U.S. Code Cong. & Ad News 4990.

harbored suspicions that its employees were engaged in union activity.

Regrettably, the General Counsel did not cite a single case to support a denial of employment opportunity theory in his posttrial brief and did not appeal my ruling on that issue to the Board. In fact, the first time the General Counsel cited any case to support the denial of opportunity argument was in the instant motion for reconsideration.[9] The lessons extracted from these cases now compel me to conclude that the General Counsel's decision to litigate the denial of opportunity issue was substantially justified in law and fact.

Service Operations Systems, 272 NLRB 1033 (1984), one of the principal cases cited by the General Counsel, sets forth the Board's approach where an employer has unlawfully refused to consider hiring certain employees. In that case, a successor employer successfully bid on a janitorial services contract but, for union-related reasons, refused to consider any of the incumbents for employment, although they invariably had been employed by predecessor contractors. Under normal circumstances, the number and identity of incumbents who the successor might have hired was uncertain. However, given the employer's discrimination, the Board concluded that such uncertainties should be resolved against the wrongdoer. Accordingly, the Board ordered that the respondent was required to offer employment to all former incumbent employees by seniority, discharging other employees hired since the date of the unlawful conduct. If insufficient positions were available for all interested incumbents, they were to be placed on a preferential hiring list. Id. at fn. 1.[10] The Board also agreed that, consistent with remedies in other refusal-to-consider cases, ''[f]inal determination of job availability and possible backpay liability will be properly left to compliance.'' Ibid.

Similarly, in *Alexander's Restaurant & Lounge*, 228 NLRB 165 (1977), a precedent relied on in *Service Operations Systems*, the Board found that the employer unlawfully interrogated job applicants about their union attitudes and systematically rejected anyone who appeared to harbor union sympathies. In holding that the employer's discriminatory hiring practices violated Section 8(a)(3), the administrative law judge distinguished between the wrongful act, that is, the failure to consider an applicant for employment in a nondiscriminatory manner from the remedy for such misconduct:

> Under the Act an employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment is made. [Quoting *Shawnee Industries*, 140 NLRB 1451, 1452–1453 (1963), enf. denied on other grounds 333 F. 2d 221 (10th Cir. 1964).]

Therefore, ''final determination of job availability and possible backpay liability will be properly left to compliance.'' *Apex Ventilating Co., Inc.*, 186 NLRB 534, fn. l (1970). [Id. at 179.]

See also *Dean General Contractors*, 285 NLRB 573 (1987) (determination of whether an unlawfully discharged construction worker would have been transferred to another of the respondent's sites since current project was completed, should be resolved at compliance proceeding).

Of course, the circumstances in the present case differ from those in the above-cited precedents. Among other things, in the foregoing cases, the employer discriminated directly against specific, eligible individuals or a group of workers, by failing to consider them for further employment whereas the Ger-Mar employees, whose interest in and suitability for full-time employment was unknown, could be considered indirect victims of Respondent's discrimination against its permanent work force. Apart from these differences, which do not seem critical, the above-cited cases offer reasonably close authority for the General Counsel's position in the underlying unfair labor practice proceeding. They support the argument that a denial of opportunity for permanent employment, like a failure to be considered for employment, under the proper circumstances, may constitute a violation of the Act. They also suggest that the General Counsel's failure to adduce evidence as to whether any of the Ger-Mar temporaries could reasonably expect permanent employment was not necessarily fatal to granting relief, since doubts in this regard could have been resolved against the wrongdoer. Thus, in keeping with consistent precedent, questions about which Ger-Mar employee might have been hired absent Respondent's discriminatory conduct, could have been addressed at a compliance proceeding.[11]

The General Counsel could not anticipate what weight I would attach to his denial of opportunity theory or Respondent's evidence concerning a June hiring freeze. Suffice to say that reasonable minds could differ about whether the Government proved a violation here. Moreover, in light of cases such as *Service Operations Systems*, supra, the Government surely could go one step further and reason that when the Respondent attempted to uproot its permanent work force, more than one-half of whom originally were referred by Ger-Mar, it thereby foreclosed permanent employment opportunities to the temporaries then assigned to M.P.C. In these circumstances, the Government should not be ''deterred from advancing in good faith the novel but credible extension and interpretations of the law that often underlie vigorous enforcement efforts.''[12] The fact that the Government did not prevail at trial does not mean that its decision to litigate the denial of opportunity issue was unjustified either in law or fact.

The Strike Misconduct Issue

Paragraphs 20 and 21 of the complaint allege that on or about August 5, 1985, the Respondent discharged 10 employees because of their union activity. The Applicant now

[9] In its opposition to the General Counsel's motion for reconsideration, the Respondent did not take issue with the cited cases nor offer any contrary authority.

[10] Accord: *National Car Rental System*, 252 NLRB 159, 164, 174–175 (1980).

[11] On reviewing the record, I note that 9 of the 14 Ger-Mar employees assigned to M.P.C. as of July 23, 1985, signed Teamsters authorization cards on July 20 and 22. Some of the nine wrote on the cards that M.P.C. was their employer. In addition, four or five of the Ger-Mar temporaries actively participated in strike activity. These facts could be viewed as supporting inferences that the Ger-Mar temporaries had worked at M.P.C. long enough to feel identified with the permanent work force, that they were acceptable to the Respondent, and thus, were potentially eligible to be considered for permanent employment.

[12] 5 U.S. Code Cong. & Ad News at 4990.

seeks attorney fees for successfully proving that Respondent discharged the strikers for picket line misconduct. Here, too, the General Counsel moves to dismiss the request for an award, contending that the unfair labor practice allegations were substantially justified. I find merit in the General Counsel's contentions.

At the time the amended complaint was reissued in 1988, *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), was the leading case dealing with picket line misconduct. The question in that case was whether verbal threats of physical violence and gestures intending to instill fear of bodily harm made to a number of nonstriking employees would be sufficient to disqualify the offending pickets for reinstatement. Recognizing that any picketing may have a coercive aspect, the Board nevertheless decided that an employer need not countenance conduct that amounts to intimidation and threats of bodily harm. Id. at 1046. The Board announced that henceforth it would apply the following objective test for determining whether verbal threats by strikers justify an employer's refusal to reinstatement: ''Whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'' Ibid.

Then, in *Tube Craft*, 287 NLRB 491 (1987), the Board had occasion to apply the *Clear Pine Mouldings* standard to picket line conduct marked by successive acts of blocking, the principal form of strike activity in which most of the M.P.C. employees participated. In *Tube Craft*, the Board found that strikers who had blocked access to a facility over a span of 4 days for varying periods of time ''had evidenced a strategy of refusing to limit the picketing to peaceful appeals'' and, hence, were lawfully discharged for their misconduct. Id. at 493.

In concluding that the employees listed in paragraphs 20 and 21 of the complaint also were lawfully discharged for engaging in successive acts of blocking, I relied heavily on *Tube Craft*. However, the General Counsel did not have the benefit of *Tube Craft* at the time the complaint was reissued in August 1987. Under the then-prevailing *Clear Pine Mouldings* standard, which dealt specifically with threats and acts of violence, the General Counsel could fairly litigate this issue in good faith and with a reasonable belief that episodes of blocking were not conduct which ''may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.''[13] In the absence of more definitive authority, the General Counsel had no bright line standard by which he could distinguish with certainty reasonable from unreasonable conduct. The facts must be judged on a case-by-case basis and in all but the most blatant situations, a judgment call by the trier of fact will be appropriate.

Even after *Tube Craft* issued, a valid question remained as to whether the strikers' conduct was offset by the severity of the Respondent's unfair labor practices. In *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955), the court agreed that the Board could balance a striker's misconduct against an employer's unfair labor practices which provoked the strike in determining whether reinstatement was appropriate. In the instant case, where the employees were enagaged in an unfair labor practice strike to protest the Respondent's efforts to convert them to the status of temporaries with a significant loss of benefits, and where they were locked out when they refused to transfer, and where the Respondent had committeed numerous other unfair labor practices, the General Counsel had cause to distrust the employer's claim that it discharged the employees for bona fide reasons.

Before the trial concluded, the General Counsel conceded that most of the 10 employees listed in paragraph 20 were validly discharged by no later than August 8, 1985. Nevertheless, counsel argued in its trial brief, that under the *Thayer* doctrine, it was for the Board to decide whether under the circumstances, reinstatement of these employees would effectuate the policies of the Act. Although I did not rely on *Thayer* in concluding that the listed strikers were discharged for cause, *Thayer* was and continues to be good law.[14] Consequently, the General Counsel was substantially justified in both fact and law in testing the propriety of the strikers' discharges.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The General Counsel's motion to dismiss application for an award of fees and expenses and motion for reconsideration of the supplemental interim order is granted and respondent's application for award of fees and expenses pursuant to the Equal Access to Justice Act is denied.

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[13] Several employees listed in par. 20 were engaged in abusive or threatening conduct at various times during the strike which even under *Clear Pine Mouldings*, could have provided grounds for immediate discharge. However, in most instances, determinations of culpability turned on an assessment of witnesses' credibility which is the function of the administrative law judge.

[14] See *A.P.A. Warehouses*, 291 NLRB 627, 629 (1988).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.